Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)))	CC Docket No. 95.-185

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REPLY COMMENTS OF
RHYTHMS NETCONNECTIONS INC.

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SUMMARY

Section 251(d)(2) of the 1996 Act is not a codification of the essential facilities doctrine. The Commission should adopt "necessary" and "impair" standards that recognize the requisite nature and current availability, or lack thereof, of a "comparable" element in a competitively viable national wholesale market. The "necessary" and "impair" standards are distinct standards intended to address different criteria for the unbundling of network elements. A competitor is impaired when denial of access to an element causes more than a *de minimis* disadvantage to that carrier's ability to provide the service that it seeks to offer. In applying this standard, at a minimum the Commission should require ILECs to provide loops, including the features and functionalities of xDSL-capable loops, NIDs, transport facilities and OSS.

The Commission should order ILECs to unbundle the features and functionalities of local loops based on the different services carriers provide, including advanced services. The record evidence clearly demonstrates that the Commission must include loops on the minimum list of UNEs to be unbundled. The ILEC's unbundling requirements should include the provisioning of xDSL-capable loops. The Commission's loop definition should also include a solution to the digital loop carrier ("DLC") problem faced by data CLECs. Finally, the Commission's loop definition should require line sharing.

Access to unbundled transport is the only means by which competitors can obtain wide-spread availability of transport on timely, cost-effective and reasonable terms. There is no transport substitute that rivals unbundled ILEC transport in ubiquitous access, timeliness and cost.

Contrary to the ILEC's arguments, special access tariffs and expanded interconnection agreements do not provide comparable, cost-effective alternatives to unbundled transport.

Sporadic evidence of competitor use of alternative transport is not indicative of widespread availability. The Commission should reject attempts to deny competitors unbundled transport based on the ILEC's spurious claims of technically infeasibility.

Unbundled OSS is central to competitor's ability to offer services, and must be made available on an unbundled basis. OSS access is an unquestionably critical component of a data CLEC's operations. The OSS access that incumbents provide to competitors falls short of placing competitors on an equal footing with the incumbent. Specifically, DSL providers require access to ILEC systems in order to review key loop data. Real-time, electronic OSS access is critical for competitors to have an equal opportunity to compete.

The Commission should also find that ILECs must unbundle advanced services equipment in central offices, remote terminals and controlled environmental vaults in which competitors have been denied collocation of their own advanced services equipment, and require ILECs to make available combination of UNEs.

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RHYTHMS NETCONNECTIONS INC.

Rhythms Netconnections Inc. ("Rhythms"), by its attorneys, respectfully submits these reply comments in the above-captioned proceeding[1] on the standards for identifying which network elements incumbent LECs must provide to competitors on an unbundled basis under Section 251(d)(2) of the Telecommunications Act of 1996 ("1996 Act").[2]

INTRODUCTION

Virtually all the comments filed in this proceeding recognize the critical nature of the Commission's identification of the network elements that incumbent local exchange carriers ("incumbent LECs" or "ILECs") must provide to new entrants on an unbundled basis. There is no dispute that in identifying which elements the ILECs must unbundle, the Commission must "consider" the "necessary" and "impair" standards of Section 251(d)(2) of the Act.[3] This provision directs the Commission to "consider at a minimum, whether—(A) access to such

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[1] Second Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC-Docket No. 96-98, FCC 99-70 (rel. April 16, 1999) ("Notice").

[2] Pub. L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 153, 47 U.S.C. 151 *et seq.* ("the Act" or "the 1996 Act").

[3] 47 U.S.C. § 251(d)(2).

network elements as are proprietary in nature is *necessary*; and (B) the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[4] Clearly, the Commission's interpretation and application of these standards will have a direct and determinative impact on the development of competition envisioned by the 1996 Act.

The issue of how the unbundling requirements will influence local competition is where the parties diverge. Several of the incumbent LECs assert that competition has flourished in the last three years.[5] Yet, curiously, these same incumbents have simultaneously told Congress that consumers will not enjoy the benefits of advanced telecommunications services until the ILECs are deregulated. The ILECs cannot have it both ways. Either competition exists or it does not, and as explained below, there has been very little growth in competition. In an effort to maintain their dominant market positions, the ILECs seek to limit their unbundling obligations by claiming that requiring the unbundling of too many elements would discourage new entrants from investing in their own networks.[6] If the Commission were to adopt this position, it would paralyze the development of a robust competitive marketplace where carriers had equal access to the features and functionalities used in providing telecommunications services. In order for new entrants to access the same elements that the incumbents have been using for decades, the Commission must explicitly require the ILECs to provide them on an unbundled basis. For the past three years, the ILECs have successfully stunted the emergence of competition into their

[4] 47 U.S.C. § 251(d)(2) (emphasis added).

[5] Ameritech Comments at 1-2; Bell Atlantic's Comments 3-5, 7-9; GTE Comments at 16; SBC Comments at 6.

[6] Bell Atlantic Comments 3-5, 7-9; GTE Comments at 16; SBC Comments at 6.

markets by delaying the implementation of the FCC's original UNE rules.[7] The ILECs' network elements are an integral part of any competitor's entry strategy, including facilities-based entry, because, new entrants must interconnect with ILEC networks, there is not yet a wholesale market for these elements, and the costs and delays inherent in self-provisioning are more than sufficient to frustrate the development of local competition.[8] Notwithstanding, the ILECs' protestations, unbundling of the ILECs' network will not lessen competitors' incentive to deploy their own facilities. To the contrary, competitors have an inherent and paramount incentive to find alternative sources for these features and functions in order to reduce their reliance on their primary competitors, the ILECs.[9]

Thus, the Commission should interpret and apply the "necessary" and "impair" standards under Section 251(d)(2) in light of the overriding goals of the 1996 Act, as well as the slow growth of local competition since the passage of the 1996 Act . Once competitors have successfully and fully broken into the market, economic forces will take over and drive all carriers to minimize their reliance on any one vendor, particularly when that vendor is their primary competitor.[10] In order to get to this point, however, CLECs must have access to those elements that are "necessary" to the provision of telecommunications services and without which they would be "impaired" in their ability to offer the services that they seek to offer.

Section 251(d)(2) is not, as a handful of ILECs suggest, a codification of the essential facilities doctrine under the antitrust laws. Nothing in the plain language of the statutory provision or the legislative history provides any support for this position. Indeed, the doctrine is

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[7] AT&T Comments at 38. The Commission's original UNE rules were established in the Commission's *Local Competition Order*. *Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, ¶ 380 (released August 8, 1996) ("*Local Competition Order*").

[8] MCI Comments at 3.

[9] COMPTEL at 12-13; Qwest Comments at 17.

so well-known, and so consistently advanced by the ILECs as the appropriate standard, that had Congress meant to codify it in the Act, nothing would have been easier than using the term "essential facilities." That Congress did not indicates its rejection of that standard.

A clear reading of Section 251(d)(2) demonstrates that the "necessary" and "impair" standards are two distinct standards with different meanings. The "necessary" standard requires a higher threshold in that it applies exclusively to "proprietary elements," which because of their intellectual property characteristics warrant stronger protection from unbundling.[11] The "impair" standard, on the other hand, is a lower standard in that it applies to non-proprietary elements. Therefore, the Commission should reject any that attempt to equate the two standards by claiming that the "impair" standard should be given the same meaning as the "necessary" standard. Rather, the Commission should adopt the approach advocated by state commissions, trade associations and competitors, and interpret the "impair" standard as determining whether a competitor will be disadvantaged in its ability to provide the service that it seeks to offer. As the vast majority of the comments concur, the proper focus of this standard is on whether and how a competitor who is denied access to an ILEC element is disadvantaged, not on whether that competitor is completely precluded from providing service.

Proper impairment analysis under Section 251 depends on whether competitors can access an alternative element on comparable terms and conditions either from a competitively viable wholesale market or by self-provisioning the element. This determination is thus dependent on whether the alternative element is interchangeable in terms of such characteristics as availability, cost, provisioning, and quality. Moreover, to be truly comparable, the alternative element must be available on a nationwide basis. In other words, in identifying those elements

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[10] It is unlikely that there will ever be a non-ILEC source of loops for DSL services.

that should be unbundled, the state commissions and new entrants are correct that the Commission should adopt a national minimum list of UNEs.

At a minimum, this list should include the Network Interface Device ("NID"), local loops—explicitly defined to include xDSL capable loops, DLC solutions, and line sharing—interoffice transport facilities, operations support systems ("OSS"), and in a few select situations digital subscriber line access multiplexers ("DSLAMs"). None of these elements is proprietary and an ILEC's refusal to make any of these features available would "impair" a competitor's ability to compete. Finally, the Commission should explicitly implement the Supreme Court's ruling in Iowa Utilities,[12] and order the ILECs to combine the elements that they must unbundle.

DISCUSSION

I. SECTION 251(d)(2) IS NOT A CODIFICATION OF THE ESSENTIAL FACILITIES DOCTRINE

In an effort to raise the threshold for which elements satisfy the "necessary" and "impair" standards, several ILECs mistakenly argue that Section 251(d)(2) requires an "essential facilities" analysis under the antitrust laws.[13] For example, GTE asserts that Section 251 should be interpreted in light of the essential facilities doctrine, which it claims is the only "relevant line of authority analogous to Section 251(d)(2) under which an incumbent firm can be compelled to share its facilities with competitors."[14] The essential facilities doctrine is one specific case of an exception to the general antitrust rule that a firm need not make its facilities available to competitors.[15] Contrary to the ILECs' assertions, this doctrine is not codified in Section

[11] 47 U.S.C. § 251(d)(2)(A).

[12] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

[13] GTE Comments at 15; Ameritech Comments at 29-31; Bell Atlantic Comments at Attachment 1 ¶ 7(g).

[14] GTE Comments at 15.

[15] "In the absence of any purpose to create or maintain a monopoly, the [Sherman] Act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal." ABA Section of Antitrust Law, Antitrust Law

(Footnote Continued)

251(d)(2) and should not control the Commission's interpretation of the "necessary" and "impair" standards.

As an initial matter, if Congress had intended to codify the essential facilities doctrine, it would have done so explicitly by using the term "essential facility," which Section 251(d)(2) neither incorporates nor references.[16] This is a well-known and established principle that Congress could easily have incorporated into the statute. Indeed, because the essential facilities doctrine is part of the federal antitrust laws, if Section 251(d)(2) were to be guided by this doctrine, Congress would have *mandated* that the Commission apply the "necessary" and "impair" standards in identifying UNEs. Instead, Section 252(d)(2) merely directs the Commission to "consider" whether an element meets the "necessary" and "impair" standards.

Moreover, because the antitrust laws are applicable independently of the 1996 Act's requirements, if the incumbent LECs' unbundling obligations were merely co-extensive with the essential facilities doctrine, then Congress would not have enacted Section 251(d)(2). By enacting this provision, Congress established a different and lower standard for the ILECs' unbundling obligations than that imposed by the essential facilities doctrine. Instead of resting on the case-by-case application of the essential facilities doctrine in the lengthy process of repetitive judicial litigation, Congress chose instead to draft a new statutory criterion, in order to jumpstart local competition. As NorthPoint explained, through Section 251(d)(2) Congress

Developments 271 (4th ed. 1997) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). The four elements to an essential facilities claim are: (i) a monopolist with whom the plaintiff competes controls an essential facility; (ii) the plaintiff cannot practically or reasonably duplicate that facility; (iii) the monopolist denied the plaintiff use of the facility; and (iv) the monopolist feasibly could have provided the plaintiff access to the facility. *See MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

[16] AT&T Comments at 48; MCI Comments at 30; ALTS Comments at 32-33.

deliberately determined "not to rely on the uncertain application of the essential facilities doctrine" and chose a different standard for the identification of unbundled network elements. [17]

Finally, and contrary to GTE's and Ameritech's statements,[18] there is no legislative history supporting the contention that the essential facilities doctrine applies to Section 251(d)(2). Neither ILEC is able to cite to any conference reports, committee reports or any other legitimate legislative history for their position. Rather, Ameritech cites only to a brief phrase from one witness' hearing testimony that generally references the ILECs' control over essential bottleneck facilities and the need to make those facilities available.[19] The witness was not a legislator and her comments do not rise to the level of legislative history. Thus, the essential facilities doctrine should not control the Commission's interpretation or application of the necessary and impair standards in identifying which network elements ILECs must provide to CLECs on an unbundled basis.

II. THE COMMISSION SHOULD ADOPT "NECESSARY" AND "IMPAIR" STANDARDS THAT RECOGNIZE THE REQUISITE NATURE AND CURRENT AVAILABILITY, OR LACK THEREOF, OF A "COMPARABLE" ELEMENT IN A COMPETITIVELY VIABLE NATIONAL WHOLESALE MARKET

As virtually all of the comments recognize, before the Commission can identify which network elements ILECs should be required to provide on an unbundled basis, it must establish a clear definition of the necessary and impair standards under Section 251(d)(2). Similarly, there is wide agreement that the "necessary" standard in Section 251(d)(2)(A) applies only to proprietary elements,[20] which is widely understood to mean information, software or technology

[17] NorthPoint Comments at 11.

[18] GTE Comments at 15; Ameritech Comments at 31.

[19] Ameritech Comments at 31.

[20] ALTS Comments at 14; Illinois Commission Comments at 4-7; Texas Commission Comments at 8; CPI Comments at 8; COMPTEL Comments at 17; Qwest Comments at 37; SBC Comments at 11-12; Ameritech Comments at 40.

that is protected by patents, copyrights, or trade secrecy laws.[21] By this definition, any functionality that is subject to industry standards is not "proprietary."[22]

A. The "Necessary" and "Impair" Standards are Distinct Standards Intended to Address Different Criteria for the Unbundling of Network Elements

Because the "necessary" standard only applies to proprietary elements, it should rarely be used,[23] but when it is used the Commission should apply a heightened standard that recognizes the requisite nature of providing even an ILEC's proprietary element on an unbundled basis. In other words, the Commission should find that an element is "necessary" when a carrier, as a practical matter, would be unable provide the service that it intends to offer without access to the element.[24]

It is important that the Commission recognize that the proprietary protection only extends to those features or functions of an element that actually involve disclosure of proprietary information. For example, an incumbent LEC might have a customized OSS database, software code which is unique to that ILEC and arguably proprietary. But the proprietary nature of OSS software does not mean that the database information, or access to that information could ever be proprietary. CLECs' access to the OSS databases should not be governed by the "necessary" standard. It is critical that the Commission specifically address this issue, because the ILECs have a natural and strong incentive to characterize all of their network elements as "proprietary" to minimize their unbundling obligations to their competitors, the CLECs. If the Commission

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[21] ALTS Comments at 15-16; NorthPoint Comments at 3-4; Sprint Comments at 9; SBC Comments at 11-12; Ameritech Comments at 42; MCI Comments at 21; *see* BellSouth Comments at 18-19.

[22] COMPTEL Comments at 18-19; Rhythms Comments at 4. As NorthPoint demonstrated, since "these standards and other requirements by definition would not be eligible for protection against disclosure, there is no basis for treating the network elements involved as proprietary in nature." NorthPoint Comments at 5.

[23] COMPTEL Comments at 16-17.

[24] NorthPoint Comments at 5; Allegiance Telecom Comments at 6. *See* Illinois Commission Comments at 4; Public Utility Commission of Texas Comments at 6; Qwest Comments at 37; Sprint Comments at 10; COMPTEL

(Footnote Continued)

does not preempt the ILECs from taking this type of protectionist measure now, competitors and incumbents will be litigating the issue of what elements are, or are not, proprietary for the next several years. This type of protracted litigation will only further delay the development of competition.

A plain reading of the statute demands that the Commission apply a distinct and lower standard for what constitutes "impair" under Section 251(d)(2)(B) than that applied to the "necessary" provision in Section 251(d)(2)(A). Nevertheless, a handful of ILECs equate the two standards.[25] For example, Ameritech and GTE ignore the statutory word "impair" and focus on the word "ability," arguing that the Commission should not consider whether denial of access to an element disadvantages a competitor. They contend that the Commission should find that the unavailability of an element "impairs" a CLEC if that carrier is *prevented* from providing the service it seeks to offer.[26]

This approach improperly collapses the "necessary" and "impair" standards into one test, effectively giving the same protection to non-proprietary elements that the Commission should grant only to highly sensitive elements protected by intellectual property rights. This is improper. Either the "impair" standard applies only to proprietary elements and should be granted a heightened threshold, like that applied to the "necessary" standard, or the "impair" standard should apply to all elements and must be interpreted consistent with the plain meaning of the word, which is to "diminish."[27]

Comments at 19-20; US West Comments at 25-26; CPI Comments at 7-8; Level 3 Comments at 5; MCI Comments at 18-19.

[25] Ameritech Comments at 34-37; GTE Comments at 20; SBC Comments at 5 ('impair' is defined as "[to] preclude meaningful opportunities for competitive entry," a substantively similar test to that for 'necessary'); US West Comments at 11 (espousing the same interpretation as SBC).

[26] Ameritech Comments at 34-37; GTE Comments at 20.

[27] A proper reading of Section 251(d)(2) reveals that the term "proprietary elements" applies to both the "necessary" and "impair" standards with the result that both screening standards apply only to proprietary elements

(Footnote Continued)

The Commission should also reject Ameritech's invitation to whether an ILECs' refusal to provide the element will prevent the CLEC from providing service within two years.[28] The statute includes no basis for such a position, and such predictions are at best uncertain and at worst highly prejudicial. The Commission must consider the current effect on a CLEC that is unable to access an ILEC element today. It "is axiomatic that if a CLEC could enter the market in two months if it obtains access to network elements, but would be delayed for two years if it did not, then that CLEC would be 'impaired' in its ability to offer service during those two years if it is denied access to the LEC's elements."[29]

B. A Competitor is Impaired When Denial of Access to an Element Causes More than a *De Minimis* Disadvantage to that Carrier's Ability to Provide the Service that it Seeks to Offer

As several of the comments advocate, the Commission should find that a carrier denied access to an ILEC element is "impaired" when forcing that carrier to use an alternative element will cause the CLEC to incur a disadvantage, beyond a "de minimis" increase in cost, but does not completely deny the CLEC the ability to provide the service that it seeks to offer.[30] This interpretation is consistent with the plain meaning of the statutory provision and appropriately recognizes how an ILEC's refusal to make a UNE available directly affects the viability of local competition.[31]

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while no standards are applicable to non-proprietary standards. Rhythms Comments at 10. Rhythms recognizes that the Commission has adopted a different interpretation of the statute. The definition of the "impair" standard, however, remains the same regardless of whether it applies to "proprietary element" as stated in the Act or to all elements.

[28] Ameritech Comments at 36.

[29] AT&T Comments at 31. *Accord e.g.* MCI Comments at 18; Sprint Comments at 10-11.

[30] Rhythms Comments at 7; Illinois Commission Comments at 4-7; NorthPoint Comments at 6; MCI Comments at 16-18; COMPTEL Comments at 9; AT&T Comments at 27-28.

[31] Because the "impairment" standard includes more than a *de minimis* increase in cost, it comports with the antitrust principle that raising rivals' cost is anticompetitive and exclusionary. For example, as explained more fully below, ILECs have sufficient market power in the transport market that they are able to set their special access prices well above the UNE total element long run incremental cost ("TELRIC") that would exist in a fully

(Footnote Continued)

In order to determine whether lack of a UNE diminishes a CLEC's ability to provide service—or grants an ILEC a significant competitive advantage—the Commission must determine whether an alternative element is available in the wholesale market or can be self-provisioned under comparable terms and conditions. It is important to note that the mere "availability" of an element is not sufficient, as some ILECs suggest,[32] to avoid "impairment." Rather the alternative element must be "comparable," or "interchangeable," with the ILEC's UNE.[33] Interchangeability means that there is no material difference between the ILEC UNE and the alternative element in terms of "functionality, quality of service, cost, scope of availability, timeliness of provisioning, and other factors consistent with the public interest."[34] As AT&T summarized, a competitor's ability to provide service is diminished if by being denied access to the ILEC element, "it is unable to provide service as broadly, as effectively, or as promptly as it would if access were granted."[35]

Moreover, when examining the existence of a viable alternative element, the Commission must consider whether the alternative element will allow the CLEC to provide the service that it *seeks to offer*.[36] As NorthPoint appropriately demonstrates, the only relevant service is that which the CLEC wishes to provide. "For a DSL carrier seeking loops, for example, a competitive wholesale market for copper loops is a substitute for the incumbent LEC loop;

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competitive transport market. In this way, incumbents can use their market power to raise their rivals' cost to gain an anticompetitive advantage.

[32] GTE Comments at 14-20; SBC Comments at 9-10; US West Comments at 12-15..

[33] COMPTEL Comments at 14-16; MCI Comments at 4; Qwest Comments at 16; ALTS Comments at 26-30.

[34] ALTS Comments at 26-27. *See also* AT&T Comments at 27-29; MCI Comments at 16-17; Network Access Solutions Comments at 10-13; Oregon PUC Comments at 2;Ohio Commission Comments at 5.

[35] AT&T Comments at 29.

[36] 47 U.S.C. § 252(d)(2)(B).

wireless local loops or other broadband end-user alternatives are not substitutes."[37] Thus, when determining whether alternative UNEs are available through either a competitive wholesale market or self-provisioning, the Commission must determine not only whether that alternative is being provisioned under comparable terms and conditions, but also whether it is a suitable alternative for the particular service at issue.

The record supports Rhythm's view that a fully competitive wholesale market requires the presence of competing providers that have the capability to furnish the element requested by the competitive LEC in the quantities and time frames needed.[38] A few ILECs take the extreme position that the mere presence of *any* alternative facilities is sufficient to demonstrate the existence of a wholesale market.[39] However, a competitive wholesale market is not created by the presence of one other provider. To the contrary, a fully competitive market for elements requires that there be a "sufficient number of wholesale vendors."[40] The ILECs' argument fails to recognize that even if competitors can obtain an element from an independent source, if that element is not "equivalent in functionality, ease of operation, speed to market, quality, or price to the ILEC network element, then that element is not interchangeable with the ILEC's network element," and it is not a sufficient alternative to avoid impairment.[41]

C. The Commission Should Establish a Minimum Set of Unbundled Network Elements to Fully Effectuate the Provisions of the 1996 Act

The Commission must also consider the geographic scope of the market. The record supports NPRM's tentative conclusion that explicit national standards for identifying which elements should be unbundled is essential to ensuring that both the Commission and the states

[37] NorthPoint Comments at 9.
[38] NorthPoint Comments at 8.
[39] GTE Comments at 33; Bell Atlantic Comments at 15-16; US West Comments at 12.
[40] Qwest Comments at 16.

are able to fully implement the procompetitive goals of the 1996 Act.[42] As MCI noted, "only national unbundled network element rules can provide uniformity and predictability in the marketplace that new entrants need to formulate and execute national business plans to offer local telephone service."[43] Contrary to SBC's and Ameritech's suggestions, a minimum list of UNEs available on a national basis is not inconsistent with Section 251(d)(2) or the Supreme Court's decision.[44] As several state commissions noted, the 1996 Act directs the FCC to make the initial determination on what network elements should be made available.[45] Moreover, the issue of a national list of elements was not even subject to appeal and the Court never addressed this issue in *Iowa Utilities*.[46] Thus, a national list of network elements is entirely consistent with the 1996 Act as interpreted by the Supreme Court's decision.

The state commissions are correct that a national list of elements will not only facilitate competitive entry, but also streamline the state arbitration process.[47] If the Commission were to examine the existence of wholesale markets at the granular level of wire centers, as Ameritech and GTE propose,[48] it would cause a fire storm of litigation at the state level. Incumbents and CLECs would spend significant resources and time litigating what is a UNE. Such a result would cause a further drain on both commission and carrier resources away from the build out of facilities and the provision of competitive innovative services. This, is turn would cause even

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[41] Qwest Comments at 22-23.

[42] ALTs Comments at 3, 8; AT&T Comments at 40; California PUC Comments at 3; COMPTEL Comments at 23-26; Illinois Commission Comments at 2; NorthPoint Comments at 1-3; Texas Commission Comments at 1; Qwest Comments at 32; Iowa Board Comments at 1-2.

[43] MCI Comments at 4-5. *See* Iowa Board Comments at 2; Ohio Commission Comments at 4.

[44] SBC Comments at 15; Ameritech Comments at 53.

[45] Texas Commission Comments at 2 *citing* 47 U.S.C. § 252(d)(2); Iowa Board Comments at 1-2; Illinois Commission Comments at 2; Ohio Commission Comments at 2.

[46] Texas Commission Comments at 2-3; Illinois Commission Comments at 2; Ohio Commission Comments at 2; COMPTEL Comments at 24.

[47] California Commission Comments at 4; Illinois Commission Comments at 2.

[48] Ameritech Comments at 55; GTE Comments at 57-63.

further delay in deployment.[49] Moreover, as AT&T predicts, "the extent of such litigation would dwarf even the experiences of the last three years, because this time it would be endless."[50] Therefore, as a matter of both law and policy, the Commission should affirm its earlier decision and adopt a national list of UNEs.

Once the Commission establishes a minimum list of elements to be provided on an unbundled basis, it should periodically review this list to ensure both that the listed elements continue to meet the appropriate standards and that any new elements are added to the list. To this end, ALTS proposes that the Commission adopt a biennial review process and that all UNEs on the minimum list should remain available through the conclusion of the first biennial review.[51] Although Rhythms concurs that periodic review is appropriate,[52] we are concerned that a two-year interval is overly ambitious. Even the district court's "triennial reviews" of the AT&T consent decree proved impossible to complete on time. Regardless of the interval chosen, however, the Commission should place the burden of proving that a particular element should be removed from the national list firmly on the ILECs.[53] Similarly, it is reasonable for CLECs to assume the burden of proof that new elements should be added to the minimum list.[54] While

[49] The Commission's Advances Services proceeding provides a good example of how litigation can delay deployment. The Commission first initiated its Advanced Services proceeding in 1998. The Order did not become effective until June of 1999. To date, the ILECs have not fully complied with this Order.

[50] AT&T Comments at 41-42.

[51] ALTS Comments at 6-7.

[52] Rhythms Comments at 28.

[53] ALTS Comments at 7; Qwest Comments at 2, Illinois Commission Comments at 7-8; Texas Commission Comments at 4.

[54] ALTS Comments at 7; New York Department of Public Service Comments at 2, 5; US West Comments at 32; BellSouth Comments at 29.

both the FCC and state commissions should be able to add elements to the list,[55] the Commission should have exclusive decision-making authority to remove elements.[56]

III. AT A MINIMUM THE COMMISSION SHOULD ORDER ILECS TO PROVIDE TO CARRIERS ON AN UNBUNDLED BASIS, LOOPS, INCLUDING THE FEATURES AND FUNCTIONALITIES OF xDSL CAPABLE LOOPS, NIDs, TRANSPORT FACILITIES, AND OSS.

There are several elements from the Commission's original list of seven UNEs that continue to satisfy Section 252(d)(2) unbundling requirements. Clearly, the Commission should require incumbents to unbundle the NID and loops. In addressing loops, the Commission should specify that the ILECs must unbundle xDSL capable loops, including any necessary conditioning, for the provisioning of advanced services. In addition, given DSL services' technological requirement for copper loops, the unbundling obligations should include any solutions available for working around digital line carrier in the outside plant. Furthermore, the loop definition should incorporate the ability of a carrier to provide data services over the same loop that is used to provision voice services. Finally, the Commission should specify that a competitor has the right to information regarding the availability of loops, including the physical make-up of those loops, as well as the right to designate a particular loop that it wants as the its UNE loop.

The Commission should also continue to find that incumbents must offer transport as UNEs. With regard to transport, there are no alternatives to the ILECs' transport that are comparable in terms of ubiquitous access, provisioning or cost. Contrary to the ILECs'

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55 ALTs Comments at 5; Illinois Comments at 3-4; Ohio PUC Comments at 25; Qwest Comments at 42; Washington Commission Comments at 3.

56 ALTS Comments at 5-6; COMPTEL Comments at 53-54; Illinois Commission Comments at 3-4; Joint Comments of Choice One Communications, Network Plus, Inc., GST Telecom Inc., CTSI, Inc., and Hyperion Telecommunications, Inc. at 3; MCI Comments at 13-14; MGC Communications Comments at 7-8.

arguments, sporadic instances of competitor use of alternative transport is not indicative of a viable wholesale market for transport.

There is no question that CLEC access to the ILECs' OSS is critical to the provision of competitive services. The Commission should explicitly require ILECs to provide OSS such that CLECs have the equivalent access to the same information that is available to the incumbents. Specifically, the Commission's definition of OSS should ensure that CLECs have access to specific information on the physical make-up of the loop, which is vital to the provisioning of certain advanced services.

Finally, under a proper application of the "impair" standard, the Commission should not, except in a few select instances, include Digital Subscriber Line Access Multiplexers ("DSLAMs") on its UNE list. ILECs should only be required to unbundle DSLAMs where a competitive advanced service provider is not able to access a potential customer because either (i) the CLEC is denied collocation space in the central office, CEV, RT or other premises, or (ii) the loop to that customer is provisioned over DLC.

A. The NID is A Gateway to Customers' Inside Wiring and Should be an Unbundled Network Element Required by the Commission

A substantial number of commenters, including competitive LECs and state commissions, recognize that the inability to access the NID would materially diminish a competitor's ability to offer services, and thus, competitors should have access to the NID as a separate unbundled network element or as a part of unbundled access to loops.[57] In contrast, SBC and GTE argue that a NID is an inexpensive piece of equipment, sold on the open market,

[57] Allegience Comments at 20; ALTs Comments at 48; AT&T Comments at 83-84; Competitive Policy Institute at 17; COMPTEL Comments at 35-37; E.spire Comments at 20; MGC Comments at 9; and Rhythms Comments at 18.

and therefore does not satisfy the "impair" standard.[58] What the these incumbents fail to recognize, however, is that competitors need to access the ILEC NID — the NID that serves as the interface between the loop and a subscriber's inside wiring — in order to provide their own services. If competitors are denied access to the NID they will be unable to connect to the inside wiring, making the provision of any competing service impossible. This impact, which far exceeds the appropriate test for impairment, demonstrates that the NID must be provided to CLECs on an unbundled basis under Section 251(d)(2)(B).

B. The Commission Should Order ILECs to Unbundle the Features and Functionalities of Local Loops Based on the Different Services Carriers Provide, Including Advanced Services

1. The Record Evidence Clearly Demonstrates that the Commission Must Include Loops on the Minimum List of UNEs to be Unbundled

There is no legitimate dispute that ILECs must be required to provide competitors unbundled access to local loops, which are the "quintessential bottleneck network elements."[59] The vast majority of commenters recognize that loops, which is not a proprietary facility, clearly satisfies the Section 251(d)(2)(B) impair standard.[60] This is true because there is no competitive wholesale market in existence for loop facilities today. Moreover, because of the high cost of "duplicating the existing 'last mile,'" it is "unlikely that a wholesale market for non-ILEC loop alternatives will develop in the foreseeable future."[61]

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[58] SBC at 33; GTE at 56.

[59] AT&T Comments at 59. In its *Local Competition Order*, the Commission required the unbundling of loops, which were defined as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises." *Local Competition Order* ¶ 388.

[60] ALTS Comments at 36; AT&T Comments at 59-61; Joint Comments of Choice One Communications, Network Plus, Inc., GST Telecom Inc., CTSI, Inc., and Hyperion Telecommunications, Inc. at 15-16; Level 3 Comments at 15; MCI Comments at 43-44; MGC Comments at 2; NorthPoint Comments at 13-14; Oregon PUC Comments at 2; Qwest Comments at 56; US West Comments at 38.

[61] ALTS Comments at 37.

Notwithstanding the strong record evidence to the contrary, a handful of ILECs have taken the extreme position that ILECs should not be required to unbundle certain local loops.[62] GTE, for example, attempts to create the illusion of a wholesale market on the basis that a few competitors have access to fixed wireless and are, in some cases, building fiber directly to the customer's location.[63] What GTE fails to recognize, however, is that fixed wireless options "are not technically suitable for wireline loops, and are not available at all on a wholesale basis—let alone on a basis that would provide an alternative interchangeable with an ILEC unbundled loop."[64] Indeed, even SBC acknowledges that wireless is not yet a viable alternative to the local loop.[65]

Likewise, self-provisioning the local loop plan is not an economically viable alternative to the ILEC's loop.[66] Self-provisioning local loops would require CLECs to make a substantial initial sunk investment in loop facilities "before they had a customer base large enough to justify such an expenditure."[67] In addition, because of the build-out schedules and the need to secure municipality and ILEC authority for use of rights-of-way, self-provisioning the local loop plant would cause substantial delays in market entry. This type of obstacle "would critically undermine the prospects for widespread competitive entry."[68] For these reasons, eliminating loops from the national minimum list of UNEs would "foreclose UNEs as a method of entry and effectively would upend the pro-competitive plan adopted by Congress in the 1996 Act."[69]

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[62] GTE Comments at 10, 63-70. GTE argues that loops serving certain business customers, multi-dwelling units or loops serving new residential or commercial developments should not be subject to unbundling obligations. *Id.* Ameritech Comments at 100-106; Bell Atlantic Comments at 36-39; BellSouth Comments at 70-76.

[63] GTE Comments at 64.

[64] ALTS Comments at 37.

[65] SBC Comments at 28.

[66] AT&T Comments at 61-66.

[67] AT&T Comments at 63.

[68] AT&T Comments at 66.

[69] ALTS Comments at 37 (citation omitted).

GTE's claim that the availability of local loops through interconnection agreements or special access tariffs justifies eliminating loops from the ILEC unbundling obligations is ludicrous.[70] ILEC interconnection agreements are not an *alternative* to unbundled loops, but only a means of enforcing Section 251. In any event, as the last three years have amply demonstrated, if the Commission does not require ILECs to offer loops on an unbundled basis, ILECs will not agree to offer loops in their interconnection agreements.[71]

2. The ILEC's Unbundling Requirements Should Include the Provisioning of xDSL Capable Loops

As several of the commenters have noted, DSL providers require access not only to the transmission facility between the ILEC central office and the end user, but access to the ILECs' xDSL capable loops.[72] An xDSL capable loop is merely a contiguous copper facility, unfettered by any intervening equipment such as load coils, repeaters, or an excessive number of bridge taps. Since DSL services are technologically dependent on these *clean* copper loops, DSL providers who are denied access to these loops will not only be impaired, they will be eliminated from the market entirely.

For this reason, the Commission should adopt Rhythms' proposed definition of the loop, which is consistent with several other parties' positions, in that it incorporates those "features and functionalities" of the loop, including "access to, and if necessary conditioning existing plant to provide, contiguous metallic wire links unfettered by load coils, repeaters and excessive

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[70] *See* GTE Comments at 61-63.

[71] Likewise, loops that are purchased out of the ILECs' special access tariffs are neither an alternative, nor comparable to, the unbundled local loops that incumbents must now provide. First, special access loops are ILEC facilities, so they do nothing to eliminate reliance on the IELC network. Second, tariffed loops are only available at prices well above incremental cost and are subject to the terms and conditions unilaterally imposed by the ILEC. Unbundled local loops, on the other hand, must be priced based on the Commission's mandated pricing methodology of Total Element Long Run Incremental Cost. Thus, forcing competitors to rely on the ILECs' special access tariffs to acquire loops would place these competitors at a substantial competitive disadvantage.